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IN THE

Supreme Court of the United States

October Term, 1970

No. [redacted] 266

S. S. SILBERBLATT, INC., and
THE STERLING COMPANY,

Petitioners,

v.

THE RENEGOTIATION BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
The Questions Presented	2
The Statute and Constitutional Issue Involved	3
The Stipulated Facts	5
Point I—The anomalous distinction, made as to renegotiation in 1955, as between a contract for military housing let by public bidding where payment was by public funds, and a contract similarly made where payment was by private funds conditioned on Government checking and consent, is arbitrary, discriminatory and without any reasonable relation to the principle and constitutional basis of renegotiation	9
Point II—The "reasons" assigned by the Respondent in the court below for the discrimination cannot bear analysis	16
Point III—Correction of several erroneous statements which were in Respondent's brief below and may be repeated	20
Point IV—Reasons for Granting the Writ	22
Conclusion	23
Appendix A—Opinion of the United States Court of Appeals for the Second Circuit	1a
Appendix B—Opinion of the Tax Court	3a
Appendix C—Relevant Statutes	17a

TABLE OF AUTHORITIES

PAGE

Cases:

Anthony P. Miller, Inc. v. United States, 161 Ct. Cl. 455 (1963), cert. den., 375 U.S. 879 (1963) 4, 5

Baxstrom v. Herold, 383 U.S. 107 (1966) 16

Hartford Co. v. Harrison, 301 U.S. 459 (1937) 14, 15

Levy v. Louisiana, 391 U.S. 68 (1968) 16

Lichter v. United States, 334 U.S. 742 (1948) 9

Morey v. Doud, 354 U.S. 457 (1957) 14

Rinaldi v. Yeager, Warden, 384 U.S. 305 (1966) 14, 15

R.P.R. Construction Company v. Renegotiation Board, T.C. Memo 1970-21 22

S.S. Silberblatt Inc. and The Sterling Company v. The Renegotiation Board, 51 T.C. 907 (1969) 2

Spaulding v. Douglas Aircraft Co., 154 F.2d 419 (9th Cir. 1946) 21

Statutes:

10 U.S.C. §2301 *et seq.* 5

12 U.S.C. §§1748-1748i 4, 5, 6

28 U.S.C. §1254(1) 2

42 U.S.C. §§1594-1594k 4

50 U.S.C. App. §1211 *et seq.* 2, 3, 10

P.L. 235, 58 Stat. 78 (1944) 3, 10

Miscellaneous:

Construction Statistics, 1915-1964, U.S. Department of Commerce (1966) 17

1970 World Almanac, p. 36 8

Statistical Abstract of the United States, Budget Expenditures for National Defense, U.S. Department of Commerce, Bureau of the Budget (1955-1968) 17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners S. S. SILBERBLATT, INC., and THE STERLING COMPANY, pray for a writ of certiorari to review the decree and opinion of the United States Court of Appeals for the Second Circuit rendered and entered in this consolidated renegotiation proceeding on May 5, 1970.

Opinions Below

The decision of the Court of Appeals, not yet officially reported, unanimously affirmed on the opinion below the determination of the Tax Court of the United States by Judge John E. Mulroney on March 5, 1969, that the petitioners had "realized excessive profits for the fiscal year ended January 31, 1960, in the amount of $1,900,000, less any applicable tax credit for said fiscal year." See Appendix A *infra*.

The opinion of Judge Mulroney is officially reported in 51 T.C. 907, and is reproduced as Appendix B *infra*.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 50 U.S.C. App. §1218a.

The basis for federal jurisdiction in the Tax Court was 50 U.S.C. App. §1218.

The Questions Presented

After having been heard by the Renegotiation Board, the case was tried *de novo* in the Tax Court on an extended stipulation of facts which, with its incorporated documents, was filed in that Court, submitted to the Court of Appeals as the "Joint Appendix" (JA 3 *et seq.*), and is here pursuant to Rule 21.

Hence the case is solely one of law. The stipulation thus stated it (JA 8, ¶15):

> "15. In the event the Court holds (a) the Contract is not subject to the Renegotiation Act of 1951 (50 U.S.C. App. §1211, *et seq.*), or (b) the Contract is exempt from the Renegotiation Act pursuant to 50 U.S.C. App. §1216(a)(9), or (c) the Renegotiation Act as applied to the Contract, or the determination of allegedly excessive profits issued by the Board in this case, is unconstitutional, the Court shall enter judgment that the petitioners realized no excessive profits for the aforesaid fiscal year. Otherwise, the Court shall enter judgment as determined by respondent that petitioners realized excessive profits from contracts and subcontracts subject to the Renegotiation Act in the amount of $1,900,000 for said fiscal year, less any applicable tax credit. The foregoing issues are the sole issues in this case."

The Statute and Constitutional Issue Involved

The Renegotiation Act of February 25, 1944 (P.L. 235; 58 Stat. 78) included among the listed exemptions:

> "(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility" (58 Stat. at 88).

This exemption was reenacted in 1955 (50 U.S.C. App. §1216(a)(9)) but with the inclusion for the first time of an exception. So reenacted it reads:

> "(9) any contract, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility, other than a contract for the construction of housing financed with a mort-

> gage or mortgages insured under the provisions of Title VIII of the National Housing Act, as now or hereafter amended."

The reference to "Title VIII of the National Housing Act" is to the so-called "Capehart Housing Act." (12 U.S.C. §§1748-1748i and 42 U.S.C. §§1594-1594k). See Appendix C.

For the reasons to follow we claim that the 1955 enactment is, if applied to impose renegotiation in this case, a denial of Equal Protection and Due Process.

The effect of injecting this exception to the exemption was that, whereas previously public competitive bidding excluded renegotiation irrespective of the source of the agreed payments to the contractor, in 1955 renegotiation was imposed where such payments were made under Government supervision by private funds raised by mortgage to a bank, the ultimate repayment being guaranteed by the Government.

We challenge the constitutionality of this differentiation between contracts for identical personnel housing publicly let by competitive bidding.

The purpose of the Capehart Act was succinctly stated in *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455 (1963), cert. den. 375 U.S. 879 (1963):

> "In essence, that Act is designed to provide housing for armed services personnel without the use of appropriated funds. To accomplish this objective, the Act provides for construction of housing projects on Government-owned property, pursuant to competitive

bidding by private builders using private mortgage financing insured by the Federal Housing Administration (FHA) and guaranteed by the Military Departments. When the project is completed, the Department is responsible for amortizing the mortgage debt, including the payment of interest thereon, by the use of annual military appropriations for quarters allowances of service personnel".

The Stipulated Facts

This proceeding involves Housing Contract No. AF-30 (636)-136, made May 6, 1957, between (1) the United States (the Department of the Air Force), (2) the petitioner S. S. Silberblatt, Inc., called "the eligible builder" and the "Contractor", and (3) five Delaware corporations called the "mortgagor-builders" (JA 10; Jt. Ex. 1-A). The Contractor was their organizer and sole stockholder. The procedures under the Capehart Housing Act were followed (JA 5).

The Contract was for the construction of 1,685 dwelling units for military and other Government employees on the Air Force Base at Plattsburg, New York, to be built in accordance with complete drawings, plans and specifications prepared and furnished by the Department, and also a full detailed contract drawn by the Department itself, and put up by the Department for competitive bidding.

Silberblatt was awarded the Contract as the lowest bidder in open public competitive bidding conducted by the Department according to the Federal Statute (10 U.S.C. §§2301 *et seq.*). It had bid $25,874,100, or approximately $2,000,000 below the statutory maximum (12 U.S.C. §1748b

(b)(3)(B)) and $1,000,000 below the Federal Housing Administration's own cost estimate made as required by law (12 U.S.C. §1748b(b)(3)(A)). The spread between Silberblatt and the second lowest bid was $1,600,000, and between Silberblatt and the third bidder was $2,726,000. (Stip. ¶5, JA 4.)

The Government was not required to accept the Silberblatt bid. It could have sought a lower price, or could have cancelled the procedure. (Stip. ¶8(a), JA 5.)

The five "mortgagor-builders" were formed by the Contractor with paid-in capital stock of $1,000 each owned by the Contractor. Each of the five thereupon leased certain designated Government-owned lands at the Plattsburg Air Force Base for a term of fifty-five years, paying as a total rent under each lease the sum of $1,000. The five corporations then borrowed $27,578,000 from the Chemical Corn Exchange Bank of New York, a private banking institution, evidenced by their promissory notes and secured by their mortgages on the leased premises. (Stip. ¶8b, f, JA 5, 6; Jt. Exs. 2-B, 3-C, JA 64, 73.)

The mortgages were insured by the Federal Housing Administration and guaranteed by the Department of the Air Force. The stock of the mortgagor-builders and the resignations of their officers were placed in escrow by the Contractor to be delivered to the Department of the Air Force *only* upon completion or termination of the building project. The mortgagor-builders used the proceeds of the mortgage loans to make payment to the Contractor in amounts previously approved by the Government. (Stip. ¶8, JA 5, 6, 15, 16, 45, 46.)

The Contract authorized the inspectors of the Air Force to supervise continuously every detail as the work progressed, interrogate all Silberblatt's employees, and inspect all its books (JA 5, 27, 54). No interim or final payment could be made to the Contractor without the Government's prior specific approval certified by the Government's "Contracting Officer and the Commissioner" of Federal Housing (JA 15, 45, 46, 54).

After the Contractor had been thus paid, the construction loans and mortgages were repayable to the Chemical Corn Exchange Bank in installments over a 25-year period, with the remaining balance of principal due June 1, 1984. The money for these installment repayments was annually appropriated by Congress. (Stip. ¶8c, f, JA 5, 6.)

Work under the Contract was commenced shortly after the award, and the project was duly completed in October, 1959. The total contract price was $27,799,717, which included, at the Department's request, four added alternates and an increase based upon a wage determination (Stip. ¶6, JA 4.)

After completion and full payment to the Contractor (Silberblatt), the buildings were allocated by the Department to military personnel (Stip. ¶8f, JA 6).

The buildings were simple housings, standardized in design, and made of commonplace material standardized in price—wood, brick, cement, etc.

The Stipulation of Facts contains no suggestion of collusion, deception, fraud, breach of contract, or improper performance.

At the date of the Contract (May 6, 1957), Eisenhower was President and the country was at peace. President Truman's local "police action" in Korea had simmered down to the still continuing truce. As to Vietnam, only "military advisers" were then there. None was injured until months later, to-wit, October 22, 1957. Congress did not adopt "the Gulf of Tonkin Resolution" until August 7, 1964 (1970 World Almanac, p. 36). The Silberblatt Contract was completed and paid five years previously (JA 4).

In short, as to Silberblatt (the Contractor), this was the Government's own contract—solicited, advertised for and made with the lowest bidder on the Government's own terms, performed on its own land, under its own continuous supervision, at less than its own estimate, and with payments to the Contractor (both interim and final) conditioned on the Government's express and fully informed assent in each instance.

Always the Government itself was in the driver's seat, holding the reins and the whip. Silberblatt was merely the horse.

The Housing Contract contained in paragraph 37 the following clauses (JA 59):

> "(a) This Housing Contract shall be subject to any Act of the Congress, whether heretofore or hereafter enacted and to the extent indicated therein, providing for the renegotiation of said Housing Contract and shall be deemed to contain all the provisions required by any such Act without subsequent amendment of this Housing Contract specifically incorporating such provisions."

* * *

"(c) Nothing contained in this clause shall impose any renegotiation obligation with respect to this Housing Contract or any subcontract hereunder which is not imposed by an Act of the Congress, heretofore or hereafter enacted."

I

The anomalous distinction, made as to renegotiation in 1955, as between a contract for military housing let by public bidding where payment was by public funds, and a contract similarly made where payment was by private funds conditioned on Government checking and consent, is arbitrary, discriminatory and without any reasonable relation to the principle and constitutional basis of renegotiation.

Renegotiation was originally enacted in 1942 following the Japanese attack on Pearl Harbor and the ensuing war for survival in which (to quote *Lichter* v. *United States*, 334 U.S. 742, 762-3, fn. 7 (1948)):

> "The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. * * * Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; * * *"

In the presence of these extraordinary necessities, said this Court (p. 760 fn.):

> "To obtain speed we have had to use contracting methods that would never have been tolerated in peacetime."

That these extraordinary considerations had no application to construction of housing for military personnel, contracts for which were drawn by the Government according to its own full plans and specifications and then awarded through public competitive bidding, was shown by the fact that the Renegotiation Act, as enacted February 25, 1944 (P.L. 235; 58 Stat. 78), provided that there should be *exempted* from renegotiation:

> "(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement or facility": (58 Stat. at 88).

This total exemption was reenacted in 1955, but in that year Congress wrote into the exemption an exception, so that the exempting clause then read (50 U.S.C. App. §1216 (a)(9)):

> "(9) any contract, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility, other than a contract for the construction of housing financed with a mortgage or mortgages insured under the provisions of title VIII of the National Housing Act, as now or hereafter amended."

Congress thereby subdivided the classification of military housing contracts drawn by the Government itself and awarded through competitive public bidding in such wise (1) that renegotiation became applicable where interim and final payments were made from private funds conditioned on Government prior assent in each instance, but (2) not where such payments were made out of appropriations or bond money previously provided by Congress.

The Silberblatt Contract was not made in wartime or at the push of a panic button. There is nothing in the Stipulation of Facts which even hints at the absence of full freedom and opportunity on the part of the Government to ascertain full information both before and after the Contract. The buildings were simple and standardized by the Government's own plans; the materials were commonplace and standard; the prices were in public quotation; the labor costs were unionized; the land, the Base, the drawings, the specifications, the contract terms, the bidding regulations, the right of inspection, acceptance or rejection were all the Government's own exclusively and at all times. 730 days were allowed for the construction (JA 13).

The Silberblatt Contract contains the following provisions conditioning any payment, interim or final, to the Contractor and assuring the Government complete access at all times to all sources of information including the Contractor's own records, books and employees' payrolls (JA 15, 16):

> "Applications for payment shall be filed by the eligible builder at least five days before the date upon which payment is desired. The eligible builder shall be entitled to payment only in the amount approved by the mortgagees, Contracting Officer, and the Commissioner with respect to said application. * * *
>
> "Upon completion of the improvements, including all landscape requirements, the balance due the eligible builder hereunder shall be payable to the eligible builder upon the expiration of thirty (30) days from the date of final completion and acceptance of a project by the mortgagor-builder, the Contracting Officer, the Commissioner and the mortgagee; provided, however, the mortgagor-builder, the Contracting Officer, or mort-

gagee may withhold approval of final payment until after the expiration of any period which laborers, subcontractors, and materialmen may have for filing notice of mechanics' liens."

At JA 45:

"(a) The eligible builder shall submit to the Contracting Officer his application for each payment on FHA Form 2448 and, as agent for the mortgagor-builder, shall submit to the Contracting Officer FHA Form 2403. The Contracting Officer may refuse to process the eligible builder's application for payment unless such application is free from error and ambiguity and is itemized so as to permit analysis and comparison with the Trade Payment Breakdown to this Housing Contract."

At JA 27:

"(32) The Department will make all inspection necessary to determine compliance with the terms of this Housing Contract."

At JA 37, 38:

"(a) Except as otherwise provided herein, all material and workmanship, if not otherwise designated by the Specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on."

At JA 54:

"The eligible builder will submit weekly during the construction period to the Contracting Officer certified copies of all payrolls * * * The eligible builder will

make his employment records available for inspection by authorized representatives of the FHA, Contracting Officer and the Department of Labor, and will permit such representatives to interview employees during working hours on the job."

Thus the 1955 injection of an exception to the exemption produced a most curious anomaly. Congress in effect recognized that none of the factors which justified renegotiation and made it constitutional, applied to housing contracts awarded through competitive bidding, because (i) normal peacetime contracting methods are being used, (ii) the plans and specifications are known precisely and are the Government's own, (iii) the costs are capable of accurate estimate, (iv) the competition is vigorous, (v) the Contractor is not making any use of Government plant, equipment or capital, and (vi) all payments are conditioned on the Government's prior consent.

Nevertheless Congress in 1955 subdivided this building classification between two categories of contracts to which all of the foregoing factors equally apply. If the Government itself, through appropriated funds or a bond issue, pays the builder for the cost of the project—whether the price is $10,000,000, $50,000,000 or $100,000,000—the contract is not subject to renegotiation. On the other hand, if the builder who was the lowest in aggressive competitive bidding is paid with private funds but conditioned on the Government's prior assent and stipulated right of access to all information, then the above quoted exception to the mandatory exemption purports to impose renegotiation.

There could not be more openness and more opportunity and freedom for the Government to assure and protect

itself than in this Silberblatt case. In fact at all times everything was the Government's *own* planning, doing, and decision,—drawings, specifications, terms of contract, method of arriving at it, estimation of cost, freedom of choice to reject, to request information, to negotiate further, or to adopt (JA5). The cost of materials and labor were standard and readily ascertainable. The construction was also simple and standard. The right of inspection at all times and throughout was absolute (JA27). No interim payments and no final payment to the Contractor could be made without the Government's specific approval.

In short, the Government was always in command. The Contractor was always naked to the Government's eye. See the Contract's provisions quoted *supra*.

The Stipulation of Facts contains no suggestions whatever of concealment, collusion or fraud. Silberblatt's bid was far below the Government's own estimate and the other bids (JA4).

The Equal Protection Clause requires that statutory subdivisioning bear a reasonable and just relation to the legislative objective, and that presence or absence of burdens be not arbitrary but "be applied with an even hand." (*Rinaldi* v. *Yeager*. 384 U.S. 305, 311 [1966].). The test, set forth in *Morey* v. *Doud*, 354 U.S. 457, 465 (1957), is as follows:

> "* * * a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found."

This *Morey* case is one of many citing *Hartford Co.* v. *Harrison*, 301 U.S. 459 (1937). This *Hartford* decision

struck down a statute exempting mutual insurance companies but not stock companies from its application. It is highly pertinent here. The Court there said (301 U.S. 461-2):

> "* * * [M]ere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.
>
> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense."

In *Rinaldi* v. *Yeager, Warden, et al.*, 384 U.S. 305 (1966), this Court said (308-9):

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *McLaughlin* v. *Florida*, 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out. * * * But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' *Baxstrom* v. *Herold*, 383 U.S. 107, 111; *Carrington* v. *Rash*, 380 U.S. 89, 93; *Louisville Gas Co.* v. *Coleman*, 277

U.S. 32, 37; *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415."

To the same effect are:

Levy v. *Louisiana*, 391 U.S. 68, 71 (1968);
Baxstrom v. *Herold*, 383 U.S. 107, 111 (1966).

II

The "reasons" assigned by the Respondent in the court below for the discrimination cannot bear analysis.

The Respondent's "reasons" were on pages 32 and 33 of its brief.

Assuming that in their reply to this Petition the Respondent will repeat this listing, we answer each as follows:

(1) "The extensiveness of the Capehart military housing program."

Actually, the Capehart program was not of great size relatively. It represented only a small part of the annual housing starts in the United States and was also small when compared with those contemporaneous Government construction programs listed by the statute as exempt from renegotiation with or without competitive bidding.

Also, the Capehart program never approached in construction even one-half the number of houses referred to in Respondent's brief. Thus, during the entire eight years of the Capehart Act's existence (1956-1963) only 105,549 units were built under its program. (Construction

Statistics, 1915-1964, U. S. Department of Commerce, Table 11, p. 21 (1966).) Since the statutory maximum per unit is $16,500, the annual average expenditure for Capehart Housing projects over the eight-year period of the program was less than $228 million.

In addition, the expenditures of Government funds on other construction exempt from renegotiation, although awarded by competitive bidding, amounted annually to many times the value of the entire Capehart program. For example, the Department of Defense construction projects in 1955 and each subsequent year were well in excess of $2 billion dollars a year. (Statistical Abstract of the United States, Budget Expenditures for National Defense, U. S. Department of Commerce, Bureau of the Budget (1955-1968); Construction Statistics, 1915-1964, New Construction Put in Place in the United States by Type, 1915-1964, U. S. Department of Commerce, Table 2, p. 7 (1966).)

(2) "The absence of adequate cost data."

Actually, there was no such "absence." The materials were commonplace and their cost market-place knowledge.

Moreover, no reason is suggested why such alleged "absence" should be more present in Capehart construction by public letting than in the case of any other like construction by public letting.

In fact, as the Stipulation states, the Department itself did estimate the cost, and Silberblatt's bid was a million dollars lower (JA 4).

The Stipulation makes no reference whatever to any "absence of adequate cost data."

(3) The alleged "emergency nature" of Capehart Housing.

But the exempt construction contracts awarded by competitive bidding were no less emergency programs. These include NASA space programs, military construction programs, missile sites, all of which are expressly exempted from renegotiation.

Furthermore, the facts stated in the Trial Stipulation contain no reference to emergency. 730 days (two years) were allowed for completion (JA 13). Neither the Stipulation nor the Contract contains provisions indicative of emergency.

(4) "Additional interest cost under the Capehart program."

This alleged reason is fanciful. It really works the other way. The avowed purpose of Capehart Housing was to decrease the financial burden on the Government, by using private funds and after completion gradually repaying the private lenders out of the annual quarters allowances. Though a modest interest rate of 4% was payable on the loans, the net effect intended was to save the Government tremendous sums in immediate appropriations, or alternatively large borrowings from banks or the public, and higher taxes.

(5) "The desire to avoid windfall profits and the omission of cost certification."

This statement, if intended to be relevant here, is incomprehensible to us.

The Stipulation in this very case is that "The Federal Housing Administration (FHA) estimated the cost of the project at $26,800,478." Silberblatt's bid was $1,000,000 less than the Government's own estimate and was $2,000,000 less than the maximum average price per family unit fixed in the Capehart Housing Act itself (JA 4).

Not a nickel could be paid the Contractor without the Government's prior consent and its access to all information. (JA 15, 16, 27, 37, 38, 45, 54.)

The Respondent's statement that "Congress relied upon renegotiation and competitive bidding to control excessive profits" overlooks that Congress also granted exemption from renegotiation in like building contracts by competitive letting.

The best protection against "windfall profits" is competitive public bidding with a right in the Government to reject the result or to negotiate with the lowest bidder for a still lower figure, and the correlative right to prevent interim and final payment to the Contractor except with its fully informed prior consent and right of inspection at all times.

(6) "Cost savings due to the construction of low cost, multiple dwelling units."

This also we do not understand. Are we being urged to believe that Congress and the Air Force intended that, because these buildings were "low cost", the Government would have greater difficulty in checking cost of materials and labor, or should have a share of the contract price?

III

Correction of several erroneous statements which were in Respondent's brief below and may be repeated.

(1) The Respondent's brief below said (p. 14, and similarly at pp. 22, 24, 26, 28):

> "In the Tax Court, petitioner conceded that it had realized excessive profits in the amount of $1.9 million, as determined by the Renegotiation Board."

We earnestly submit that such statements pervert the Stipulation (JA 8, par. 15), and beg an issue of law to be decided. Judge Mulroney put no such interpretation upon the Stipulation. On the contrary he called this portion of it "the issue stipulation" (JA 113).

By in effect turning the Stipulation upside down, the Respondent's brief makes it read as if the Stipulation said initially and unconditionally that factually there were $1,900,000 in "excessive profits," and then tried to cancel this out by producing an issue of law,—namely, was renegotiation nevertheless inapplicable to this Silberblatt contract?

Actually the Stipulation puts it the other way round. First to be decided is the issue of the constitutionality of any claimed renegotiability. If unconstitutional, then "*the Court shall enter judgment that the petitioners realized no excessive profits.*"

(2) We also submit that Respondent's brief below was mistaken in its frequent assertions that paragraph 37 of

the Contract (JA 59) committed Silberblatt to submit to renegotiation. For example, on page 27 it said:

> "By this clause, petitioner, in the language of the statute (50 U.S.C. App. 1214), 'agrees * * * to the elimination of excessive profits through renegotiation.'"

We do not find in paragraph 37 any such words. In our view the way the Respondent's brief expressed itself begged an issue of law.

Such words do not appear in paragragh 37, which expressly makes this reservation:

> "(c) Nothing contained in this clause shall impose any renegotiation obligation with respect to this Housing Contract or any subcontract hereunder which is not imposed by an Act of the Congress, heretofore or hereafter enacted."

This clause provides in effect that the Housing Contract is subject to renegotiation only if there is a valid and applicable Act of Congress so providing. If the Act is unconstitutional or invalid as here applied, then the Silberblatt Contract is not subject to renegotiation. Directly in point is *Spaulding* v. *Douglas Aircraft Co.*, 154 F.2d 419 (9th Cir., 1946), in which the Court said (p. 422):

> "We are unable to see how the making of the contract and its performance estops the subcontractor appellants from contending that it is not controlled by a statutory provision which, if unconstitutional, does not exist. The performance of the contract and claim for the amount due therefrom is in no way inconsistent with the contention that it is not subject to renegotiation."

IV

Reasons for Granting the Writ

The most recent reported decision in a Capehart Housing Act renegotiation case was handed down by the Tax Court only last February (February 3, 1970), *R.P.R. Construction Company* v. *Renegotiation Board,* T.C. Memo 1970-21. Unquestionably there are other Capehart Housing contracts outstanding which may be the subject of renegotiation proceedings by the Government.

Equal Protection of the Laws and its broader companion Due Process touch the deepest and most fundamental constitutional guarantees of a free society.

Although Congress has the constitutional power to raise and support armies, nevertheless in so doing it is not permitted to create in a given classification of building contracts for the housing of military personnel discriminations which in comparison with each other, and in the imposition of financial burdens and risks on the contractor, are arbitrary and without rational relation to the total subject matter.

Moreover, as far as we can ascertain, this Court has had no occasion to review the constitutionality or application of renegotiation in the case of a construction contract since *Lichter* v. *United States,* 334 U.S. 742, decided in *1948.*

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

No. 517—September Term, 1969.

(Argued April 20, 1970 Decided May 5, 1970.)

Docket No. 33613

S. S. SILBERBLATT, INC. and THE STERLING COMPANY,
Appellants,

—against—

THE RENEGOTIATION BOARD,
Appellee.

Before:

MOORE and SMITH, *Circuit Judges;*
WEINFELD,* *District Judge.*

Appeal from the decision of the Tax Court of the United States, John E. Mulroney, *Judge,* entered March 5, 1969, which sustained the Renegotiation Board's determination that the petitioners had realized $1.9 million in excessive profits in their fiscal year ended January 31, 1960, as a result of work on a Capehart Act military housing project.

Affirmed on the opinion below.

CHARLES H. TUTTLE, New York, N. Y. (Breed, Abbott & Morgan, Edward J. Ross and Miriam C. Feigelson, New York, N. Y., of counsel), *for Appellants.*

* Of the Southern District of New York, sitting by designation.

Opinion of the United States Court of Appeals for the Second Circuit

RONALD R. GLANCZ, Attorney, Department of Justice, Washington, D. C. (William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Washington, D. C., of counsel), *for Appellee.*

PER CURIAM:

The decision of the Tax Court, holding (1) the provisions of the Renegotiation Act of 1951, as amended (50 U.S.C. App. §§1211 et seq.) to be applicable to excessive profits realized under a Capehart Act housing contract (42 U.S.C. §§1594-1594k; 12 U.S.C. §§1748-1748i) and (2) such application to be constitutional, is affirmed on the opinion of Judge Mulroney, reported at 51 T.C. No. 89 (March 4, 1969).

APPENDIX B

Opinion of the Tax Court

51 T. C. No. 89

TAX COURT OF THE UNITED STATES

Docket No. 1041-R.

Filed March 4, 1969.

S. S. SILBERBLATT, INC. and THE STERLING COMPANY, *Petitioners,*

v.

THE RENEGOTIATION BOARD, *Respondent.*

Held: Capehart Housing Contract subject to the 1951 Renegotiation Act and such prospective application is not unconstitutional under the Fifth Amendment.

Edward J. Ross, for the petitioners.

Michael R. Lemov, for the respondent.

MULRONEY, *Judge*: A consolidated renegotiation proceeding was held by respondent with respect to petitioners for the fiscal year ended January 31, 1960. It resulted in respondent issuing a unilateral order which provided that of petitioners' profits realized during the aforesaid fiscal year from a Government contract and related subcontracts the amount of $1,900,000 ($1,764,853 after adjustment on account of State income taxes) was excessive within the meaning of the Renegotiation Act of 1951.

The parties have entered into a stipulation of facts and issues and submitted the case pursuant to Rule 30 of the Rules of Practice of this Court.

During its fiscal year ended January 31, 1960, and at all times material hereto, the petitioner, S. S. Silberblatt, Inc. (hereinafter the "Contractor"), was a corporation engaged in the general contracting business, and organized and existing under laws of the State of New York, with its office and principal place of business at New York, New York.

During its fiscal year ended January 31, 1960, and at all times material hereto, the petitioner, The Sterling Company (hereinafter "Sterling"), was a partnership composed of Shephard S. Silberblatt, Bruce Silberblatt and Karen Gerard, and constituted a related group with the Contractor for the purposes of renegotiation proceedings.

On or about May 6, 1957, the Contractor entered into Housing Contract No. AF-30(636)-136 (hereinafter the "Contract"), with the United States, acting by and through the Department of the Air Force, for the construction of 1,685 dwelling units and servicing facilities, including site grading, underground utilities, streets, walks and parking areas, at the Plattsburg Air Force Base, Plattsburg, New York. The dwelling units were for military personnel and other Government employees.

The Contract was made pursuant to the authority of the Capehart Housing Act, Title VIII of the National Housing Act, as amended, 12 U.S.C. §§1748-1748(i) and 42 U.S.C. §§1594-1594(k). In general, the Capehart Act authorizes the Secretary of Defense or his designee to enter into contracts with bidders for construction of urgently needed housing for military personnel on land owned or leased by the United States, on or near a military reservation.

The building contract, pursuant to the Capehart Act, is with a newly organized "mortgagor-builder" corporation.

The Act contemplates the securing of loans from lenders acceptable to the Federal Housing Commissioner by the "mortgagor-builder" corporation. The loans provide the funds for the construction. They are evidenced by notes and secured by mortgages on the housing units and are repayable with interest by the United States over a 25-year period. All stock of the mortgagor-builder corporation is placed in escrow upon execution of the contract and may be transferred only to the Secretary upon completion of the construction or termination pursuant to the contract. The Secretary is authorized to acquire the stock and exercise all rights as a stockholder and operate and improve the housing and dissolve the corporation upon termination of the mortgages.

In the instant case it is stipulated the procedure under the Capehart Housing Act was followed by the parties to the Contract.

The Contract was awarded to the Contractor, as the lowest bidder, following the opening of bids which had been submitted on a competitive basis after public advertising. There were three bids submitted; that of the Contractor in the amount of $25,874,100 and those of two others which were higher by approximately $1,600,000 and $2,726,000, respectively. The Capehart Housing Act establishes a maximum average price of $16,500 per family unit, making a total statutory maximum of $27,802,500. The Federal Housing Administration ("FHA") estimated the cost of the project at $26,800,478. The Government was not required to accept the Contractor's bid and could have attempted to negotiate a lower price.

Work under the Contract was commenced at the site shortly after the award, and the project was completed in October 1959. The total contract price was $27,799,717, which included four added alternates and an increase based upon a wage determination. The housing covered by the

Contract was constructed pursuant to specifications furnished by the Department of the Air Force.

The housing facilities were built on Government-owned land, and were leased for 55 years to private corporations formed for such purpose, called the mortgagor-builders, the stock of which was initially owned by the Contractor. The stock of the mortgagor-builders was placed in escrow by the Contractor at the time of the execution of the Contract. The stock was endorsed in blank by the Contractor. Resignations of all officers and directors of the mortgagor-builders were similarly placed in escrow at the time of execution of the Contract. The escrow agreement provided that the stock and resignations were to be delivered only to the Department of the Air Force upon completion or termination of the project.

The mortgagor-builders obtained construction loans and mortgages pursuant to the provisions of 12 U.S.C. §§1748-1748(i). The mortgages and loans were from a private banking institution, The Chemical Bank New York Trust Company, repayable in installments over a 25-year period, with the remaining balance of principal due June 1, 1984. The mortgages were insured by the FHA and guaranteed by the Department of the Air Force.

The mortgagor-builders used the proceeds of the mortgage loans, advanced by the private banking lender, to pay construction costs. They then paid the balance to the Contractor as its profit.

Upon completion of each separate building project, the stock of the mortgagor-builder relating to each such separate project, which had been held in escrow under an agreement whereby it would be delivered to the Department upon completion or termination of the particular project, was delivered to the Secretary of Defense.

On completion, the buildings were allocated to military personnel. Payments of principal and interest on the

mortgage notes are made to the lending institution by the Department of the Air Force from appropriations made available by Congress for such purpose. Such payments commenced after construction was completed, after the stock of the mortgagor-builder had been delivered to the Government by the Contractor, and after the Contractor had received its profit.

At or about March 1, 1968, the Government had paid to the lending institution, approximately $15,157,000 in principal and interest payments on the mortgages on the Plattsburg homes. The Government did not make the first payment on such mortgage until after the Contractor had completed construction under the Contract and after it had received its profit. Sterling performed work as a subcontractor for the Contractor with respect to the Contract. During petitioners' fiscal year ended January 31, 1960, petitioners had receipts and accruals from the Contract and related subcontracts of Sterling.

As stated, renegotiation proceedings were instituted by respondent involving alleged excessive profits realized by the Contractor and Sterling during the fiscal year ended January 31, 1960. By agreement between all of the parties, the renegotiation proceedings against the Contractor and against Sterling were consolidated for hearing and determination and the Contractor was authorized to act for Sterling as its agent in connection with the renegotiation proceedings. Hereafter the term "petitioner" will be understood as referring to the related group of the Contractor and Sterling. It was in these proceedings that respondent determined petitioners had realized excessive profits in the sum of $1,900,000.

The following is the issue stipulation that was filed by the parties:

It is hereby further stipulated and agreed:

15. In the event the Court holds (a) the Contract is not subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, *et seq.*), or (b) the Contract is exempt from the Renegotiation Act pursuant to 50 U.S.C. App. §1216(a)(9), or (c) the Renegotiation Act as applied to the Contract, or the determination of allegedly excessive profits issued by the Board in this case, is unconstitutional, the Court shall enter judgment that the petitioners realized no excessive profits for the aforesaid fiscal year. Otherwise, the Court shall enter judgment as determined by respondent that petitioners realized excessive profits from contracts and subcontracts subject to the Renegotiation Act in the amount of $1,900,000 for said fiscal year, less any applicable tax credit. The foregoing issues are the sole issues in this case.

Petitioner states the two issues to be decided are as follows: (1) "Is the Housing Contract subject to the Renegotiation Act" and (2) "Is the Renegotiation Act unconstitutional to the extent it may apply to Capehart Housing Contracts or to the determination of allegedly excessive profits issued by the Renegotiation Board in this case?"

Section 1212 of the Renegotiation Act (50 U.S.C. App.) provides for renegotiation of "all contracts with the Departments specifically named in section 103(a)" [§1213(a) of 50 U.S.C. App.].[1] The last numbered section provides "[t]he term 'Department' means * * * the Department of the Air Force."

It is difficult to understand how, in the light of such express statutory direction, there could be any argument

1. Section 1216 that exempts some specifically described contracts from the application of the Renegotiation Act is not here applicable.

that the Contract here involved would not be *subject* to the Renegotiation Act. Petitioner does not discuss this plain statutory language which clearly declares that the Renegotiation Act is applicable to the Air Force Contract that is here involved.

If it be thought there is any doubt about such applicability of the Renegotiation Act to Capehart Housing Contracts with the Department of the Air Force we need but turn to 50/U.S.C.A. §1216(a)(9) [1969 Pocket Part], which exempts any construction contract awarded as a result of competitive bidding "* * * other than a contract for the construction of housing financed with a mortgage or mortgages insured under the provisions of title VIII of the National Housing Act, as now or hereafter amended [sections 1748-1748h of Title 12]." Here it is stipulated this was a contract for construction of housing by petitioners that was financed by mortgages insured under the provisions of Title VIII of the National Housing Act.

The legislative history of said section 1216(a)(9) shows conclusively that it was the intent of Congress that contracts for the construction of housing pursuant to the Capehart Act, such as involved in this case, were to remain subject to renegotiation:

> The exemption provided in this section is made not applicable to military housing construction financed with a mortgage or mortgages insured under the provisions of title VIII of the National Housing Act, as now or hereafter amended. The committee was advised by the chairman of the Senate Banking and Currency Committee that that committee in framing legislation providing for military housing had relied upon the fact that such contracts would be subject to the Renegotiation Act. The Renegotiation Board has no objection to the exemption contained in this section. [*Senate Report No. 582 to accompany H. R. 4904, 84th Cong., 1st Session, June 20, 1955.*]

We hold, in answer to the first stipulated issue, that petitioner's housing contract was subject to the Renegotiation Act.

50 U.S.C. App. §1214, provides that if the contract is subject to the Renegotiation Act the "Secretary * * * shall insert in each contract * * * a provision under which the contractor agrees— (1) to the elimination of excessive profits through renegotiation; * * * (3) that he will insert in each subcontract * * * a provision under which the subcontractor agrees * * * to the elimination of excessive profits through renegotiation; * * *." This section goes on to provide in subsection (4) "[a] provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this section shall be sufficient compliance with this section." And the subsection goes on to provide that whether or not the specified clause is inserted in the contract to which the Act is applicable, the contract shall be considered as having been made subject to the Act to the same extent as if such provision had been inserted.

Paragraph 37(a) on page 26 of the contract here involved provides as follows:

> 37. Renegotiation.
>
> (a) This Housing Contract shall be subject to any Act of the Congress, whether heretofore or hereafter enacted and to the extent indicated therein, providing for the renegotiation of said Housing Contract and shall be deemed to contain all the provisions required by any such Act without subsequent amendment of this Housing Contract specifically incorporating such provisions.

As stated, petitioner does not discuss the statutes that plainly place Capehart Contracts under the Renegotiation Act. Petitioner points out that 50 U.S.C. App. §1214, fur-

ther provides in subsection (4) that the renegotiation consent clause will only bind the contractor "if the contract * * * is subject to" the Renegotiation Act. Part of petitioner's argument is that the contract is not *subject* to the Renegotiation Act because the Act when so applied is unconstitutional. It is petitioner's position on brief that the Renegotiation Act is "unconstitutional or otherwise invalid as applied to this contract" and therefore "the Housing Contract is not subject to renegotiation despite the renegotiation clause" in the contract.

Petitioner makes some contention on brief that application of the Renegotiation Act to Capehart contracts would be invalid, because the Capehart projects are financed with "private funds." The argument is that these contracts should not be renegotiated because, as petitioner states on brief, "the basic concept of renegotiation is recapture of payments made by the Government." The argument ignores the fact it is the Government's unconditional obligation to repay the loan from which petitioner is paid his profits.[2]

The policy of renegotiation as declared by Congress in 50 U.S.C. App. §1211, is that "excessive profits be eliminated" in contracts financed by funds made available "by appropriation and otherwise." It is the Government that ultimately pays, out of appropriated funds, the full con-

2. Paragraph 29, page 9 of the Contract provides as follows:

> The Department shall, to the extent that advances made against the mortgage-notes (identified in the Building Loan Agreement above referred to) have been approved by the Commissioner, make payments in accordance with the terms of said notes, provided that this obligation to make payments shall not become effective until the Commissioner shall have finally endorsed said notes for mortgage insurance or upon complete termination of the Housing Contract at the convenience of the Department prior to completion of the projects. The Department shall, upon the initial endorsement by the Commissioner of said notes for mortgage insurance, deliver to the mortgagee its guaranty of the payment of said notes.

tract price under Capehart Housing Contracts. It is obvious that this method of financing presents the same danger of excessive profits paid by the Government as direct Government payments to builders. It is to be noted that the Renegotiation Act applies to subcontractors who receive no payments from the Government. We hold the application of the Renegotation Act to Capehart Contracts is not rendered improper because of project financing by private loans that are ultimately repaid by the Government.

Petitioner's main argument is that the Renegotiation Act is unconstitutional under the Fifth Amendment to the extent that it might apply to Capehart Housing Contracts. The argument is based almost entirely on *Lichter* v. *United States*, 334 U.S. 742 (1948). In that case the Supreme Court held the Renegotiation Act of 1942 was not unconstitutional as a denial of due process, as applied retroactively to war contracts made prior to the enactment of the Renegotiation Act. Petitioner reviews all of the factors mentioned in the *Lichter* opinion that the court held justified a retroactive application of the law, such as: (1) the necessity for rapid procurement, (2) the specifications were not known or there was no time to prepare detailed specifications, (3) the items had never been made before or if they had estimates of cost were mere guesses, and (4) lack of competition. Petitioner argues on brief that "[n]one of these factors has the remotest relationship to Capehart Housing."

We see no necessity for reviewing the facts and circumstances surrounding the enactment of the Capehart Act and the execution of the housing contracts entered into thereunder. In the *Lichter* case there was no statute providing for renegotiation at the time the contract was entered into and therefore no renegotiation clause in the contract. Under the specific terms of the contract and under the law at the time the contract was entered into the contractor had a right to all of the profits even if they were what might be termed excessive.

In the instant case the Renegotiation Act is being given a prospective application. It was in full force and effect at the time petitioner entered into the contract with the Department of the Air Force in 1957. The law rightly placed the renegotiation clause in the Contract. By this clause petitioner, in the language of the statute (50 U.S.C. App. §1214), "agrees * * * to the elimination of excessive profits through renegotiation."

It was on the authority of the Supreme Court decision in the *Lichter* case that we held the retroactive application of the Renegotiation Act of 1951 was constitutional when applied to contracts entered into during the Korean Conflict and prior to the date of the enactment of the Renegotiation Act of 1951 on March 23, 1951. *Baltimore Contractors, Inc.* v. *Renegotiation Board*, 43 T.C. 611 (1965), aff'd. 383 F. 2d 690 (1967).

We do not understand that the constitutionality of the prospective application of the Renegotiation Act under the Fifth Amendment depends upon the existence of a war emergency, or the necessity of rapid procurement, or unknown specifications or the lack of competition. We know of no case so holding and petitioner cites none.[3] The Rene-

3. It is not without significance that there are many renegotiation cases where the Renegotiation Act is given a prospective application and its constitutionality is not assailed though it is obvious the factors petitioner feels necessary to support constitutionality were not present. Just to list a few:

Martin Manufacturing Company v. *Renegotiation Board*, 44 T.C. 559 (1965). Renegotiation of 1959 and 1960 profits of a competitively bid procurement contract for manufacture of shirts and jumpers for the Armed Forces;

Finnie Co. v. *United States*, 31 T.C. 1182 (1959). Renegotiation of 1944 profits of a contract for procurement of shelled, salted, roasted peanuts in 8 ounce cans;

Ellis Coat Co. v. *Secretary of War*, 9 T.C. 1004 (1947). Renegotiation of 1942 profits of a contract for manufacture of coats, jungle hammocks, etc.;

W. Tip Davis Co. v. *Patterson*, 12 T.C. 335 (1949). Renegotiation of 1942 profits of a contract for purchase of desks, files, and chairs.

gotiation Act merely provided for a method of contracting whereby contractors who desired to contract with certain named departments had to agree to renegotiation procedure. It applied to all contracts with those departments after the passage of the Act in 1951. It applied to some contracts that had been entered into before the enactment of the Renegotiation Act such as those where the last payment had not been made. 50 U.S.C. App. §1212. It is this retroactive application that has given rise to the constitutional issue present in such cases as *Lichter* v. *United States*, *supra*, and *United States* v. *Pownall*, 65 F. Supp. 147 (C. D. Calif. 1946), relied upon by petitioner, as well as *Baltimore Contractors* v. *Renegotiation Board*, *supra*. Those cases involving retroactive application of the Act are not authority for petitioner's argument that the Renegotiation Act, as applied to Capehart Housing Contracts, a prospective application, is unconstitutional. We hold the Renegotiation Act as applied to Capehart Housing Contracts is constitutional. Petitioner, as low bidder, was awarded a contract wherein it agreed the profits would be subject to renegotiation. It took the benefits and it must submit to the agreed to burden. It is not being deprived of its property without due process by virtue of the application of the Renegotiation Act to its contract.

Petitioner makes one further argument with respect to the constitutional issue. It is that 50 U.S.C.A. §1216(a)(9) [1969 Pocket Part] of the Renegotiation Act, previously mentioned, which exempts from renegotiation the competitively bid housing contracts, except for Capehart Housing Contracts, is unconstitutional as creating a classification which is unreasonable, arbitrary and discriminatory and one that has no relation to the object of the Renegotiation Act.

There is no merit in petitioner's argument. Petitioner cannot argue the Renegotiation clause is to be inserted in all contracts or if it is to be left out of some construction contracts it must be left out of all. Much the same argument was advanced in *United States* v. *Carolene Products Co.*, 304 U.S. 144. In upholding a ban on interstate shipments of "filled" milk but not banning shipments of butter substitutes of the same composition the Court said, p. 151:

> Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes * * * [t]he Fifth Amendment has no equal protection clause, * * *. A legislature may hit at an abuse which it has found, even though it has failed to strike at another. * * *

One basic distinction between the Capehart Housing Contracts and other construction contracts is that there is financing by Government guaranteed loans in Capehart Housing Contracts. Evidently Congress thought there was greater danger of realizing excessive profits in that type of contract. Congress does not have to act with complete uniformity in the field of regulatory legislation. *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The Fifth Amendment contains no equal protection clause. As stated in *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943), the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process * * *. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." It is apparent from the legislative history and the terms of the Act that the classification established by 50 U.S.C.A. §1216(a)(9) [1969 Pocket Part] was carefully considered

by Congress.[4] It is not an arbitrary or unreasonable classification.

We hold petitioner's contract was subject to the Renegotiation Act of 1951 [50 U.S.C. App. §1211, *et seq.*] and not exempt from the Renegotiation Act under 50 U.S.C.A. §1216(a)(9) [1969 Pocket Part]. This means pursuant to the stipulation of the parties, petitioner realized excessive profits in the amount of $1,900,000, less any applicable tax credit, in the fiscal year in issue.

An order will be issued in accordance herewith.

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4. Senator Ives. Senator Capehart, do you feel this bill is foolproof against windfall profits?

Senator Capehart. It is just as foolproof against windfall profits as building tanks, or building airplanes, or building ships or anything else is. You award the contract to the lowest bidder and expect him to make a profit. *But if he makes too much you take it away from him in renegotiation.* * * * Any profit they make they will pay normal taxes on, which at the moment is 52 percent. *In addition they come under the Renegotiation Act. If they do not, they should. We will write it into the bill.* [Emphasis added.] [Hearings Subcommittee of the Committee on Banking and Currency, 84th Cong., 1st Sess. pp. 52, 53.]

APPENDIX C

Relevant Statutes

The Renegotiation Act of 1951, as amended, 50 U.S.C. App. §§1211 *et seq.*, provides in pertinent part:

§1211. Congressional declaration of policy

It is recognized and declared that the Congress has made available for the execution of the national defense program extensive funds, by appropriation and otherwise, for the procurement of property, processes, and services, and the construction of facilities necessary for the national defense; that sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts, in the course of said program; and that the considered policy of the Congress, in the interests of the national defense and the general welfare of the Nation, requires that such excessive profits be eliminated as provided in this title [sections 1211-1223 of this Appendix]. Mar. 23, 1951, c. 15, Title I, §101, 65 Stat. 7.

§1212. Contracts subject to renegotiation—Generally

(a) The provisions of this title [sections 1211-1224 of this Appendix] shall be applicable (1) to all contracts with the Departments specifically named in section 103(a) [section 1213a of this Appendix] and related subcontracts, to the extent of the amounts received or accrued by a contractor or subcontractor on or after the first day of January 1951, whether such contracts or subcontracts were made on, before, or after such first day, and (2) to all contracts with the

Departments designated by the President under section 103(a) [section 1213(a) of this Appendix], and related subcontracts, to the extent of the amounts received or accrued by a contractor or subcontractor on or after the first day of the first month beginning after the date of such designation, whether such contracts or subcontracts were made on, before, or after such first day. * * *

§1213. Definitions

For the purposes of this title [sections 1211-1224 of this Appendix]—

Department

(a) The term "Department" means the Departpartment of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Maritime Administration, the Federal Maritime Board, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Agency, and the Atomic Energy Commission. Such term also includes any other agency of the Government exercising functions having a direct and immediate connection with the national defense which is designated by the President during a national emergency proclaimed by the President, or declared by the Congress, after the date of the enactment of the Renegotiation Amendments Act of 1956 [August 1, 1956]; but such designation shall cease to be in effect on the last day of the month during which such national emergency is terminated.

* * *

Relevant Statutes

Renegotiate and renegotiation

(d) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this title [sections 1211-1223 of this Appendix] of the amount of any excessive profits.

Excessive profits

(e) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title [sections 1211-1233 of this Appendix] to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

(2) The net worth, with particular regard to the amount and source of public and private capital employed;

(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

* * *

§1215. Renegotiation proceedings—Proceedings before Board

(a) Renegotiation proceedings shall be commenced by the mailing of notice to that effect, in such form as may be prescribed by regulation, by registered mail or by certified mail to the contractor or subcontractor. The Board shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail or by certified mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in sec-

tion 108 [section 1218 of this Appendix], such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *

§1216. Exemptions

(a) Mandatory exemptions

The provisions of this title [sections 1211—1224 of this Appendix] shall not apply to—

* * *

(9) any contract, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility, other than a contract for the construction of housing financed with a mortgage or mortgages insured under the provisions of title VIII of the National Housing Act, as now or hereafter amended [sections 1748—1748h of Title 12]. Aug. 3, 1955, c. 499, 69 Stat. 447.

* * *

§1218. Review by the Tax Court

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—

* * *

file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing, such court shall have exclusive jurisdiction, by order, to determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency except as provided in

section 108A [section 1218a of this Appendix]. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

§1218a. Review of Tax Court decisions—Jurisdiction

(a) Except as provided in section 1254 of Title 28, the United States Courts of Appeals shall have exclusive jurisdiction to review decisions by the Tax Court of the United States under section 108 of this Act [section 1218 of this Appendix] in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, except as otherwise provided in this section. In no case shall the question of the existence of excessive profits, or the extent thereof, be reviewed, and findings of fact by the Tax Court shall be conclusive unless such findings are arbitrary or capricious. The judgment of any such court shall be final except that it shall be subject to review, under the limitations herein provided for, by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28.

Powers

(b) Upon such review, such courts shall have only the power to affirm the decision of the Tax Court or to reverse such decision on questions of law and remand the case for such further action as justice may require, except that such court shall not reverse and remand the case for error of law which is immaterial to the decision of the Tax Court.

* * *

Relevant Statutes

The Capehart Housing Act, 69 Stat. 646, 651 (1955), 12 U.S.C. §§1748-1748i and 42 U.S.C. §§1594-1594k, provides in pertinent part:

12 U.S.C. §1748b. Insurance of mortgages—Aggregate amount of insurance; termination date

(a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Secretary is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Secretary may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this subchapter (except mortgages insured pursuant to the provisions of this subchapter in effect prior to August 11, 1955) shall not exceed $2,300,000,000: *And provided further*, That the limitation in section 1715h of this title shall not apply to this subchapter: *And provided further*, That no more mortgages shall be insured under this section after October 1, 1962, except pursuant to a commitment to insure before such date, and not more than twenty-eight thousand family housing units shall be contracted for after June 30, 1959, pursuant to any mortgage insured under this section after such date.

Relevant Statutes

Eligibility for insurance

(b) To be eligible for insurance under this subchapter a mortgage shall meet the following conditions:

(1) The mortgaged property shall be held by a mortgagor approved by the Secretary. The Secretary may, in his discretion, require such mortgagor to be regulated or restricted as to capital structure, and methods of operation. The Secretary may make such contracts with, and acquire for not to exceed $100 stock or interest in, any such mortgagor, as the Secretary may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the General Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Secretary under the insurance.

(2) The mortgaged property shall be designed for use for residential purposes by personnel of the armed services and situated at or near a military installation * * * *

(3) The mortgage shall involve a principal obligation in an amount—

(A) not to exceed the amount which the Secretary estimates will be the replacement cost of the property or project when the proposed improvements are completed (the cost of the property or project as such term is used in this paragraph may include the cost of the land, the physical improvements, and utilities within the boundaries of the property or project);

(B) not to exceed an average of $16,500 per family unit for such part of such property or

project (including ranges, refrigerators, shades, screens, and fixtures) as may be attributable to dwelling use: *Provided*, That the replacement cost of the property or project as determined by the Secretary, including the estimated value of any usable utilities within the boundaries of the property or project where owned by the United States and not provided for out of the proceeds of the mortgage, shall not exceed an average of $16,500 per family unit: *Provided further*, That should the financing of housing to be constructed pursuant to a single invitation for bids be accomplished by two or more mortgages, the principal obligation of any single mortgage may exceed an average of $16,500 per family unit if the sum of the principal obligations of all mortgages for such housing does not exceed an average of $16,500 per family unit: *And provided further*, That subject to the limitations of this paragraph no family unit included in any mortgaged property shall be contracted for after June 8, 1960 if the cost of such unit exceeds $19,800; and

(C) not to exceed the bid of the eligible bidder with respect to the property or project under section 1594 of Title 42.

The mortgage shall provide for complete amortization by periodic payments within such terms as the Secretary shall prescribe, but not to exceed thirty years from the beginning of amortization of the mortgage, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4½ per centum per annum of the amount of the principal obligation outstanding at any time. The Secretary may consent to the release of a part or parts of the mortgaged property from the lien of the mortgage upon such terms

and conditions as he may prescribe and the mortgage may provide for such release. The property or project may include such nondwelling facilities as the Secretary deems adequate to serve the occupants.

* * *

12 U.S.C. §1748d. Lease of property; terms and conditions

Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this subchapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

42 U.S.C. §1594. Contracts for construction—Contract provisions; competitive bids

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the

Secretary of Housing and Urban Development. Any such contract shall also provide that, except for stock held by the Secretary of Housing and Urban Development, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Secretary of Housing and Urban Development. Any such contract shall contain such terms and conditions as the Secretary of Defense may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary of Defense shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

Definition of "eligible bidder"

(b) For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary of Defense after consultation with the Secretary of Housing and Urban Development (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

Acquisition of capital stock of property covered by mortgage

(c) Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under title VIII of the National Housing Act, as amended by the Housing Amendments of 1955, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Secretary of Housing and Urban Development of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

* * *

42 U.S.C. §1594b. Maintenance and operation of housing; use of quarters; payment of principal, interest and other obligations

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest, and

other obligations, except those of maintenance and operation, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed $21,000,000 per month: *Provided*, That, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month.

42 U.S.C. §1594c. Services of architects and engineers; use of appropriations; acquisition of sites

Whenever the Secretary of Defense or his designee determines that it is desirable in order to effectuate the purposes of this subchapter, the Secretary is authorized, without regard to the civil service and classification laws, to procure, by negotiation or otherwise, the services of architects and engineers, or organizations thereof, under such arrangements as he deems desirable, but at an expense not in excess of that permissible under the schedule of fees allowed from time to time by the Secretary of Housing and Urban Development in connection with projects assisted under the United States Housing Act of 1937, as amended. Such services may include the development of plans, drawings, and specifications for family housing under this subchapter and other services in connection therewith: *Provided*, That such plans, drawings, and specifications may include the use on any project to be constructed under this subchapter of alternate materials or alternate types of construction, including prefabrication, that provide substantially equal value and conform to standards established by the Secretary of Housing and Urban Development: *Provided further*, That such plans, drawings, and specifications, when

developed pursuant to arrangements made under this section after August 7, 1956, shall follow the principle of modular measure, in order that the housing may be built by conventional construction, on-site fabrication, factory precutting, factory fabrication, or any combination of these construction methods: *Provided further*, That the Secretary of Defense may designate certain sites or parts thereof for family housing to be furnished from prefabricated houses or housing components. Such arrangements may include provision for advance or progress payments, for payment by third parties, for payment by the Government of any such compensation as is not paid for by third parties, and shall include provision for reimbursement by third parties to the Government of any compensation or other expenses paid by the Government pursuant to this section, and may include other provisions for compensation. Any public works appropriations now or hereafter available to the Departments of the Army, Navy, or Air Force or the Coast Guard may be obligated by the respective departments or the Coast Guard for these purposes. Reimbursements to the Government on account of payments made pursuant to this section shall be made to appropriations against which such payments were charged. The Secretary of Defense is further authorized to advance or pay to the Department of Housing and Urban Development its "Appraisal and Eligibility Statement" fees in connection with such family housing. The Secretary of Defense is further authorized to enter into arrangements by contract or otherwise for eventual acquisition by the Government, without cost to the Government of all right, title, and interest in sites on which housing is constructed pursuant to this subchapter and improvements thereon.

42 U.S.C. §1594d. Appropriations; use of quarters allowances

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1594, 1594a, 1594b, and 1594c of this title.

(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 266

S. S. SILBERBLATT, INC., and THE STERLING COMPANY, PETITIONERS

v.

THE RENEGOTIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. This action was instituted in the Tax Court of the United States to review the Renegotiation Board's determination that petitioners had realized $1.9 million in excessive profits as a result of work on a Capehart Act military housing project.[1] Not challenging

[1] The Capehart military housing program was enacted in 1955 as an emergency measure, in order to provide approximately 234,000 military housing units in a period of three years. The urgent need for these housing units was caused

the Board's determination of the amount of excessive profits, petitioners claimed in the Tax Court that the Renegotiation Act (50 U.S.C. App. 1211, *et seq.*) did not apply to military housing construction under the Capehart Act (42 U.S.C. 1594-1594k; 12 U.S.C. 1748-1748i) and that, if it did apply, such application was unconstitutional. The Tax Court rejected both arguments (Pet. App. B, 8a-16a) and the court of appeals summarily affirmed (Pet. App. A, 1a-2a).

2. There is no warrant for further review. Petitioners have abandoned their coverage argument,[2] and now rely solely on their claim that Section 106 (a) (9) of the Renegotiation Act is unconstitutional because it exempts from renegotiation all competitively bid construction contracts, except those awarded under the Capehart Act (Pet. 9-16). Petitioners contend that this distinction is so arbitrary and unreasonable as to deny them due process and equal protection of the laws (Pet. 4).

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by the low re-enlistment rate among military personnel, which was attributed in great part to the absence of adequate housing for the families of enlisted men. See S. Rep. No. 404, 84th Cong., 1st Sess., p. 10, and Hearings before a Subcommittee of the Senate Committee on Banking and Currency, Housing Act of 1955, 84th Cong., 1st Sess., v. 3, pp. 36-37, 477-478, 480. The Capehart Act declares that additional military housing is needed "[i]n order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations * * *." 12 U.S.C.

[2] In their contract with the Air Force, petitioners expressly agreed to renegotiation (Pet. 8-9).

The Renegotiation Act, Sections 102(a) and 103 (a), covers practically all defense contracts. The elimination of some competitively bid construction contracts by Section 106(a)(9)—non-construction competitively bid contracts remain subject to renegotiation—reflects a judgment by Congress that in certain areas competitive conditions are such that renegotiation is not necessary. There is nothing impermissible in subjecting to renegotiation only those government contracts that Congress has not satisfied itself are subject to truly competitive conditions.[3] Congress does not have to act with complete uniformity in the field of regulatory legislation. *Wickard* v. *Filburn*, 317 U.S. 111, 129-130; *Currin* v. *Wallace*, 306 U.S. 1, 14; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151. Only when federal legislation makes discriminations "so unjustifiable as to be violative of due process," *Bolling* v. *Sharpe*, 347 U.S. 497, 499, *Shapiro* v. *Thompson*, 394 U.S. 618, 642, is it constitutionally invalid, there being no equal protection clause in the Fifth Amendment. The legislative history and the terms of the Renegotiation Act show that the classification established by Section 106 (a)(9) was carefully considered by Congress and is not arbitrary or unreasonable.

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[3] The Senate committee hearings reveal that Congress specifically indicated its concern respecting the possibility of windfall profits resulting from overpriced Capehart Act military housing contracts. See Hearings before a Subcommittee of the Senate Committee on Banking and Currency, Housing Act of 1955, 84th Cong., 1st. Sess., v. 3, pp. 52-53, 328-329, 417-418.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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